No. 77-744

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE CARVEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-43) is reported at 560 F. 2d 1030. The decision and order of the National Labor Relations Board (Pet. App. 19-31) and the decision of the administrative law judge (Pet. App. 2-18) are reported at 226 NLRB 111.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1977. The petition for a writ of certiorari was filed on November 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner's withdrawal from a multiemployer bargaining association was untimely.

STATEMENT

1. Petitioner was a longstanding member of the Pipefitting Contractors Association (the Association), which, for approximately 20 years, had negotiated agreements for its members with Local No. 321 of the Plumbers, Steamfitters and Metal Trades, AFL-CIO (the Union). The collective bargaining agreement between the Association and the Union covering 1973-1975 provided that "[i]f either party desires a change in this agreement after April 30, 1975 they [*sic*] shall notify the other party on or before Feb. 1, 1975 and both parties shall meet within 15 days to discuss same" (Pet. App. 33).[1] Prior to February 1, 1975, the Union's business manager telephoned the Association's president and informed him that the Union desired to open negotiations to change the agreement (Pet. App. 22-23, 34).[2] On February 11 the Union sent the Association a letter, in which the Union proposed several new provisions as the subjects of discussion, remarking that in the earlier conversation "we agreed that in lieu of a called meeting at this time, it would suffice primarily to set forth in a letter the desired changes" and adding that the Union was "ready at any time to sit down with you and discuss the issues as presented" (Pet. App. 34, 23).

The Association responded with a letter on February 14, in which it stated its "understanding that this exchange of letters serves as the initial negotiation which

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[1]The agreement was to remain in effect until April 30, 1975, and be extended automatically year-to-year in the absence of timely notice of desire for change (Pet. App. 33-34).

[2]The Union also filed, prior to February 1, "appropriate papers with the Federal mediation and State mediation Boards" (Pet. App. 34).

the contract requires to take place prior to February 15th." It informed the Union that the February 11 "proposals will be presented to our Committee, and we will contact you in order to set a firm date for the next meeting for bargaining purposes" (Pet. App. 34-35, 23).

On February 27 petitioner resigned from the Association (Pet. App. 35, 23). The Union did not learn of the withdrawal until March 10, when it received a list of the Association's current members; the Union promptly questioned petitioner's absence from the list (Pet. App. 35-36). The Union never consented to petitioner's withdrawal (Pet. App. 26 n. 8, 43).

Five face-to-face negotiating sessions between the Union and the Association took place in April and May. Following a three-week strike in May, a new collective bargaining agreement was reached. Petitioner refused to sign the agreement or to abide by its terms (Pet. App. 36, 23-24).

2. The Board found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 61 Stat. 140-141, 29 U.S.C. 158(a)(5) and (1), by refusing to accept the agreement negotiated by the Union and the Association. The Board held that petitioner's withdrawal from the Association was untimely under the rule of *Retail Associates, Inc.*, 120 NLRB 388, 395. Under the *Retail Associates* doctrine "[a]n employer may withdraw [from multiemployer bargaining] without the union's consent prior to the start of bargaining * * * [but] once negotiations have actually begun, withdrawal can only be effectuated on the basis of 'mutual consent' or 'unusual circumstances' " (Pet. App. 24). Disagreeing with its administrative law judge (who found that bargaining did not begin until the first face-to-face meeting on April 9), the Board concluded that negotiations began with the

exchange of letters between the Union and the Association in the first half of February, approximately two weeks before petitioner's withdrawal (Pet. App. 24-25). The Board explained (Pet. App. 25; footnotes omitted):

> to hold, as did the Administrative Law Judge, that [petitioner's] subsequent withdrawal was timely, even though it occurred after the disclosure to the Association of the Union's bargaining demands, would be contrary to the purpose of the *Retail Associates* rule of "fostering and maintaining stability in bargaining relationships." For, an employer would thus be permitted to withdraw "in the hope of obtaining, through separate negotiations, more favorable contract terms than those which are foreshadowed" by the Union's proposals. The rule, however, is designed precisely to prevent such a "disruption of the multiemployer group *via* a race for bargaining leverage."

Consequently, the Board held that the attempted withdrawal was ineffective, and that petitioner must recognize the two-year agreement negotiated between the Association and the Union in the spring of 1975.

3. The court of appeals enforced that Board's order, holding that "[c]ertainly as applied to [petitioner] in this case, the Board's rule is not an abuse of discretion" (Pet. App. 42). The court found that the evidence supported "the [Board's] decision that the parties had opened their negotiations" (Pet. App. 41) prior to petitioner's resignation from the Association. It continued (*ibid.*):

> The contract was reopened for negotiation as required by the terms of the 1973-1975 contract. [The Union] stated its position with completeness, and, while it prudently characterized its proposals as

> "tentative proposals presented for negotiation," the Association undertook to present them to its Committee. No more could, expectably, be accomplished by a first meeting, and the parties agreed that their letters would serve as the initial negotiation required by the contract. [Petitioner], acting through the Association, was a party to the letter exchange and to that agreement on its significance. If [petitioner] would have had it otherwise, it had only to notify the Association and [the Union] before the contract date, for when those dates came and [the Union] and the Association acted, contract negotiations were under way. So, certainly, the Board was free to find, for with it lay the task of defining, within reason, what should mark the beginning of negotiations for purposes of applying the *Retail Associates* rule.

ARGUMENT

Parties to multiemployer bargaining ordinarily may not withdraw from the bargaining association once negotiations for a collective bargaining agreement have begun. This rule, established by the Board in *Retail Associates, Inc.*, 120 NLRB 388, has been uniformly upheld by the courts of appeals.[3] Petitioner does not

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[3]See, *e.g.*, *National Labor Relations Board* v. *Sheridan Creations, Inc.*, 357 F. 2d 245, 247-248 (C.A. 2); *National Labor Relations Board* v. *Dover Tavern Owners' Association*, 412 F. 2d 725, 728-729 (C.A. 3); *Universal Insulation Corp.* v. *National Labor Relations Board*, 361 F. 2d 406, 408 (C.A. 6); *National Labor Relations Board* v. *Jeffries Banknote Co.*, 281 F. 2d 893, 896 (C.A. 9); *National Labor Relations Board* v. *Johnson Sheet Metal, Inc.*, 442 F. 2d 1056, 1059 (C.A. 10).

appear to challenge the rule.[4] It contends instead that the Board erred in concluding that actual negotiations had commenced before it withdrew from the Association and that, in any event, the application of the *Retail Associates* rule here was an abuse of discretion. Petitioner's arguments thus involve only the application of settled rules to the facts of this case and do not raise any issue justifying review by this Court.

The Board properly concluded that the exchange of letters between the Union and the Association on February 11 and 14—which occurred prior to petitioner's withdrawal—was the start of negotiations. The letters show the unambiguous intention of the Union and the Association to open bargaining.

Moreover, it was not improper or arbitrary for the Board to apply the *Retail Associates* rule here. The rationale of *Retail Associates* is that a party should not be allowed to assess the opposite side's proposals before deciding whether to withdraw. Here the Union's proposals were disclosed before petitioner announced its decision to withdraw.[5] Petitioner was on notice of the time when

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[4]Petitioner's suggestion (Pet. 8) that the Board's application of its *Retail Associates* policy "without a public hearing" was an abuse of discretion is insubstantial. Petitioner apparently contends that the Board should have adopted the *Retail Associates* doctrine by rulemaking rather than adjudication (petitioner had a full adjudicatory hearing), but "[a]djudicated cases may and do * * * serve as vehicles for the formulation of agency policies, which are applied and announced therein," and such cases "generally provide a guide to action that the agency may be expected to take in future cases." *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766; see also *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294.

[5]Petitioner's assertion (Pet. 7) that the Board's decisions on the timeliness of withdrawal are inconsistent is based solely on the assumption of the hearing examiner in *Cooks, Waiters and Waitresses Union, Local 327*, 131 NLRB 198, 209 n. 26, that *Retail Associates* was of doubtful validity. But since *Local 327* was decided, the guidelines announced in *Retail Associates* have been consistently applied by the Board and have been uniformly approved by the courts. See note 3, *supra*, and *Mor Paskesz*, 171 NLRB 116, 118, enforced, 405 F. 2d 1201 (C.A. 2); *John J. Corbett Press, Inc.*, 163 NLRB 154, 157, enforced, 401 F. 2d 673 (C.A. 2); *Evening News Association*, 154 NLRB 1482, 1483, and 154 NLRB 1494, enforced, 372 F. 2d 569 (C.A. 6).

negotiations would be reopened, and it could have withdrawn before February 1, 1975, if it had desired to do so. It did not, and therefore it was required to comply with the agreement negotiated between the Union and the Association.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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